ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	BRCT-911001LY
	)	
For Renewal of License of Television Station WHFT(TV) Miami, Florida	)	
	)	
GLENDALE BROADCASTING COMPANY	)	BPCT-911227KE
	)	
For Construction Permit Miami, Florida	)	

To: The Commission

REPLY TO OPPOSITIONS

TRINITY BROADCASTING OF FLORIDA, INC.
and
TRINITY BROADCASTING NETWORK

Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Ave., N.W. -- Suite 300
Washington, D.C. 20036-2604
(202) 659-4700

December 5, 1996

TABLE OF CONTENTS

SUMMARY

The Mass Media Bureau and Glendale concede fundamental points that confirm Trinity's position. The Bureau agrees with Trinity that the minority LPTV lottery preference turned solely on ownership (whether active or passive). The Bureau also agrees with Trinity that the minority ownership exception established "a meaningful standard" of "greater than 50% minority ownership" as the circumstance that "would justify a grant" under the rule, *i.e.* that the circumstances "for a grant to an applicant" existed when minorities "would have *de jure* control of the proposed licensee." Glendale agrees with Trinity that the Congressionally mandated standard for the minority LPTV lottery preference was "more than 50% minority ownership," that the minority ownership exception sprang from that Congressional definition, that language "requiring more than 50% minority ownership" was used in "bills introduced in Congress" proposing a minority ownership exception, and that this language was "adopted by the Commission" when it enacted the exception. All of that is precisely Trinity's position.

These concessions establish that Trinity's counsel Colby May interpreted the rules correctly, or at the very least, reasonably. Because the law is clear that a reasonable interpretation (even if wrong) negates a finding of intent to deceive, Trinity cannot be disqualified.

Not worthy of credit are the contorted arguments of the Bureau and Glendale still urging Trinity's disqualification despite the concession of essential points and despite the undeniable reasonableness of May's legal interpretation. The Bureau manufactures language that does not exist and ignores language that plainly does exist. When it argues that, unlike the minority ownership exception, adoption of the minority LPTV preference did not use the word "control," the Bureau points the Commission straight to decisional error. The Commission expressly *said at the time* that

it was awarding the lottery preference to applicants "controlled" by minorities (defined as more than 50% owned); indeed, the governing statute *mandated* the preference for applicants "controlled" by minorities. The Bureau thus ignores the plain language establishing that the minority LPTV preference *did* define control, and did so in a manner identical to the definition of control that directly followed in the minority ownership exception. The Bureau further inexplicably ignores the Commission's express statement that "minority controlled" in the minority ownership exception meant "ownership" of "more than 50% of the *equity*." And it has no response to the Glasser affidavit, which establishes two dispositive facts: that the Bureau itself in 1987 interpreted the rule exactly as Trinity did; and that the Bureau granted NMTV's application after seeing corporate bylaws that expressly authorized Paul Crouch to exercise *de facto* control.

Not only does the Bureau ignore dispositive authority, it engages in sheer contrivance. Attempting to explain away Commissioner Dennis Patrick's contemporaneous interpretation of the minority ownership exception, which was Trinity's interpretation too, the Bureau simply invents a meaning that it gingerly says "one can infer" from Commissioner Patrick's words. But the Bureau's spin is thoroughly refuted by the plain and obvious meaning of what Commissioner Patrick said, which completely vindicates Trinity's position. The Bureau likewise pulls from thin air the notion that the "greater than 50% ownership" standard adopted in the multiple ownership Report and Order was merely an "application" standard. The Report and Order neither says nor implies any such thing.

In a similar vein, the Bureau (citing no authority at all) simply announces that the Commission's presumption that a cognizable interest is controlling does not apply in the particular context of the minority ownership exception. Yet the Commission has never said that either. To the contrary, the Commission has expressly stated that the presumption applies in *any* context under the

multiple ownership rules. Thus, the Bureau cannot avoid the fact that Paul Crouch was authorized to have a cognizable (hence presumptively controlling) interest in NMTV.

Trinity may not be disqualified if any *one* of the following are true: (a) Trinity's interpretation of the minority ownership policies was correct; (b) Trinity's interpretation was reasonable; or (c) clear advance notice of the Commission's requirements was not given. Since *all three* are true, Trinity's motion should be granted.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	BRCT-911001LY
	)	
For Renewal of License of Television Station WHFT(TV) Miami, Florida	)	
	)	
GLENDALE BROADCASTING COMPANY	)	BPCT-911227KE
	)	
For Construction Permit Miami, Florida	)	

REPLY TO OPPOSITIONS

Trinity Broadcasting of Florida, Inc. and Trinity Broadcasting Network (jointly "Trinity") hereby reply to the October 25, 1996 Oppositions to Trinity's motion for an order (a) vacating the record on the *de facto* control and abuse of process issues and (b) recognizing that Trinity interpreted the rules reasonably with no intent to deceive the Commission.[1]

A. Request for Leave to File Reply

As an initial matter, Trinity respectfully requests leave to file this reply for good cause shown. This proceeding has potentially drastic consequences for Trinity, which faces disqualification and possible loss of multiple broadcast licenses. In any proceeding of that gravity, it is especially important that the Commission have the benefit of a full airing of the issues before acting. Moreover, the Bureau demonstrably misapprehends the law in new arguments to which Trinity has had no

[1] Trinity also wishes to note here that it agrees fully with the points and arguments cogently made by intervenor Colby May in his Comments filed November 15, 1996.

chance to respond. This reply will measurably aid the Commission in its consideration of the issues by delineating the main points in dispute between the parties, responding to significant arguments made in the Oppositions that would otherwise be unaddressed, and correcting materially inaccurate statements that could lead the Commission into error. This will serve the public interest by enabling the Commission to render a decision that is thoroughly considered and fully informed. WLVA, Inc., 27 FCC 2d 280, 281 n. 6 (1971) (Commission considers reply pleading "[t]o be sure that the public interest is fully served").

B. Trinity's Motion Violates No Procedural Rule

While the Bureau expressly "has no objection to the Commission resolving the issues raised by Trinity" (MMB Opposition at 4), Glendale urges that Trinity's motion be dismissed as an "outlaw" pleading that improperly relies on "new evidence" (Glendale Opposition, pp. 18-27). Contrary to that contention, Trinity's motion is entirely proper under the rules. Section 1.106(a)(1) precluded a petition for reconsideration of the HDO that set forth the misinterpreted legal standards under which this case was tried. Thus, Trinity could not challenge the fundamental legal premise of the HDO until the case reached the Commission on review.[2]

Glendale wrongly claims that Trinity is seeking to reopen the record to present new evidence (the 1984 videotape and the Glasser affidavit). That argument fundamentally misapprehends Trinity's motion. The videotape and Glasser affidavit are not proffered for consideration as evidentiary *facts*. They are submitted to establish a dispositive point of *law*. Trinity's motion makes a legal argument,

---

[2] Frank H. Yemm, 39 RR 2d 1657, 1659 (1977); Algreg Cellular Engineering, 9 FCC Rcd 5098, 5122, 5123 (Rev. Bd. 1994); Western Cities Broadcasting, Inc., 6 FCC Rcd 2325, 2326 (Rev. Bd. 1991); Empire State Broadcasting Corporation (WWKB), 5 FCC Rcd 2999, 3005 (Rev. Bd. 1990).

namely that the definition of minority control adopted by the Commission for the minority LPTV lottery preference and the minority ownership exception turned on beneficial ownership alone without regard to actual working control, and that Trinity's interpretation of the rule was reasonable. The videotape and the affidavit go to that legal point. By establishing the Commission's contemporaneous understanding of "minority-controlled" when it adopted the minority ownership exception -- much the way legislative history establishes legislative intent -- the videotape and the affidavit confirm that the Commission later misinterpreted the rule and that, in any event, Trinity's interpretation was reasonable. Errors of law are always valid ground for reconsideration.[3] And even if the videotape and affidavit were treated as evidentiary facts, the public interest clearly favors considering newly-submitted facts when a licensee's basic qualifications are at stake.[4]

Above all else, there is a paramount public interest in ensuring that the Commission does justice. At issue here is whether America's leading religious broadcast network may be disqualified as a Commission licensee. Given the devastating consequences of disqualification, it is unthinkable

---

[3] WTWV, Inc., 47 FCC 2d 442 (¶2) (1974) (reconsideration proper when petitioner contends decision was "erroneous as a matter of law"); Josephine Broadcast Limited Partnership, 5 FCC Rcd 3162 (¶3) (MMB 1990) (errors of law are valid basis for reconsideration under §1.106(d)(2)).

[4] Duchossois Communications Co. of Maryland, Inc., 10 FCC Rcd 6688, 6690-91 (1995) (transcripts and audiotape submitted for first time in application for review are considered where case involves basic licensee qualifications and new material "may undermine the basis of the earlier decision"); Service Broadcasting Corp., 46 RR 2d 413, 416, n. 3 (1979) (Commission's statutory obligation to consider whether renewal grant is in public interest requires consideration of late-filed relevant facts). Glendale is also wrong in contending that Trinity's motion violates §0.602(c) of the Rules to the extent that it relies on discussion at the Commission's open meeting of December 19, 1984. Glendale Opposition at 29. Section 0.602(c), by its very terms, applies only to unauthorized pleadings that do not "conform to the other procedural requirements of" Part I. Intended to discourage the filing of post-meeting pleadings before the Commission's decision has been released, the rule does not apply to pleadings, like Trinity's Motion, that are filed "in conformance with Part I" to address relevant legal issues "*after* an agency decision has been promulgated." Sunshine Meetings, 48 RR 2d 315, 316 (1980) (emphasis added).

that the Commission would refuse on procedural grounds to consider the merits of the very serious legal argument and supporting materials that Trinity submits.[5]

C. The Reasonableness of Trinity's Position

The Bureau has offered no answer to the following fundamental point: that Trinity's interpretation of the minority ownership exception, if it was not correct, was at the very least reasonable. The Commission cannot decide this case without ruling on that point. If Trinity's interpretation was *reasonable*, then Trinity cannot be disqualified, for the law is clear that a reasonable interpretation (even if wrong) negates a finding of intent to deceive. Fox Television Stations, Inc., 3 CR 526, 527-28 (1996). And the legal standard for judging whether Trinity's interpretation was reasonable is whether published legal authority at the time would "*necessarily* have led a reasonable applicant" to a different interpretation. Id. (emphasis added). The Bureau argues merely that Trinity's interpretation of the minority ownership exception was *incorrect*. Notably missing is any suggestion by the Bureau that Trinity's interpretation was also *unreasonable*.[6]

The Bureau's obvious unwillingness to say that Trinity's interpretation was not reasonable should make apparent to the Commission that any such conclusion is unjustified. Indeed, the

---

[5] SALAD essentially shares this view, despite publicly professing annoyance that it must "waste time responding to a bulky, meritless filing" (SALAD Opposition, p. 2, n.1). SALAD's counsel, the author of that comment, has said in a more open moment that he does in fact "welcome" Trinity's motion because it serves to "focus the Commission's attention on a *critical issue*." See Attachment A (emphasis added). A critical issue, by definition, warrants the agency's serious and substantive consideration.

[6] Trinity's motion states three separate reasons why disqualification would be improvident: (1) Trinity's legal interpretation was correct; (2) Trinity's interpretation was reasonable; (3) clear notice of a different interpretation was not given. In defining "the question to be decided" as "whether the minority exception to the multiple ownership rules required that minorities have *de facto* control as well as the requisite ownership interests" (MMB Opposition at 12), the Bureau addresses only the first reason and does not dispute the other two.

transparent flaws in the Bureau's legal argument, if anything, prove that Trinity did construe the minority ownership exception both reasonably and correctly and had no clear notice of a different interpretation.

1. The Lottery Preference Precedent

The Bureau acknowledges that the minority preference in LPTV lotteries turned solely on ownership (whether active or passive). MMB Opposition at 13. Thus, Trinity's counsel, Colby May, was clearly reasonable in concluding, based on the previously adopted lottery preference, that the minority ownership exception *too* required minorities merely to have majority ownership of the applicant. Indeed, Glendale agrees that the minority ownership exception "came from the same loins as Congressional passage of the minority-preference lottery legislation." Glendale Opposition at 44. If it is reasonable for the *Bureau* to conclude (as it does) that the minority-control standard in the lottery preference turned solely on equity ownership, and if it is reasonable for *Glendale* to conclude (as it does) that the minority ownership exception tracked the minority-control standard in the lottery preference, then it was necessarily reasonable for *Trinity* to conclude (as it did) that the minority ownership exception adopted a minority-control standard that turned solely on equity ownership.

Still, the Bureau argues that Trinity was wrong to conclude that the definition of "minority-controlled" in the minority ownership exception derived from the minority lottery preference. According to the Bureau, the Commission expressly focused on "control" in the minority ownership exception. But in the earlier lottery preference, says the Bureau, the Commission had been "concerned only about ownership interests and not control." MMB Opposition at 13. Moreover, asserts the Bureau, "*the word 'control' does not appear in the discussion or rules for the awarding of low power television preferences.*" Id. (emphasis added).

That assertion is demonstrably wrong, and the error undermines the Bureau's entire position. Not only does the word "control" appear in the Commission's discussion of the LPTV lottery preference, it is the focal word in the governing statute. Section §309(i)(3)(A) directed that --

> "an additional significant preference shall be granted to any applicant *controlled* by a member or members of a minority group" (emphasis added).

In implementing that mandate by adopting a lottery preference for LPTV applicants "more than 50% of whose ownership interests are held by members of minority groups" [§1.1622(b)(1)], the Commission *said itself* that it was awarding the preference to "applicants more than 50% *controlled* by minorities." Random Selection Lotteries, 93 FCC 2d 952, 953 (1983) (emphasis added). In fact, the ALJ cited that use of the word "control" in the ID in this case (at n. 43). Thus, contrary to the Bureau's claim, and as the Bureau surely ought to know, the Commission in adopting the LPTV preference *was* concerned with "control" as employed in the statute, *did* use the word, and defined it as ownership of more than 50%. It was necessarily defining what constituted *control* by minorities, since it was implementing a statutory mandate to grant the preference to "any applicant *controlled* by minorities." The Bureau's outright misstatement of the operative authority points the Commission toward decisional error.

Because the Bureau fails to acknowledge that the LPTV preference *did* equate minority ownership with control, it mistakenly fails to appreciate that the minority ownership exception, using essentially identical words two years later, did the same thing. The statutory lottery standard said "controlled" by minorities. In 1983 the lottery rule defined a minority "controlled" entity as one "more than 50% of whose ownership interests are held" by minorities. In 1985 the minority ownership exception defined "controlled" as "more than 50% owned" by minorities. Since the

Commission used the same words to define the same concept (minority-controlled) to promote the same goal (minority ownership/diversity), it was reasonable to conclude that the minority ownership exception incorporated the same minority-control standard as the LPTV minority preference.[7]

Glendale effectively concedes Trinity's position. After concurring that the minority ownership exception "came from the same loins as Congressional passage of the minority-preference lottery legislation," Glendale continues --

> "The language used in the lottery legislation, *requiring more than 50% minority ownership*, was used *in bills introduced in Congress* and *adopted by the Commission*." Glendale Opposition at 44 (emphasis added).

On this Glendale and Trinity agree completely. The standard for minority control used in the lottery legislation required "more than 50% minority ownership." Trinity Motion at 21-25. The same language was used in the "bills introduced in Congress" proposing the minority ownership exception -- the Wilson bill defined a station as "minority controlled" where "not less than 50 percentum is owned" by minorities, and the Leland bill defined as "minority controlled" any station "the majority interest in which is owned" by minorities. Id. at 33-34. That language "was adopted by the Commission" when it created the minority ownership exception and defined as "minority controlled" and therefore eligible for the exception a station that is "more than 50% owned" by minorities. Id.

---

[7] That conclusion is not undermined by the difference between low power television (to which the lottery preference applied) and full power television (to which the minority ownership exception applied). Although the Bureau suggests that the distinction is significant (MMB Opposition at 13-14), Congress drew no such distinction when it (i) authorized lotteries for "*any* media of mass communications," (ii) defined such media to include "television" service airing programming "within the editorial control" of the licensee, and (iii) mandated a preference for lottery applicants "controlled" by minorities. 47 U.S.C. §309(i)(3)(A) and (B) (emphasis added). The statute thus imposed a minority-control standard that Congress intended would also apply to *full power* stations if lotteries were conducted for such licenses. From this, it was perfectly reasonable to conclude that the special definition of minority control did not vary between low power and full power.

at 35. By Glendale's own assessment, Colby May not only was reasonable; he was right. [8]

2. Commissioner Patrick's Contemporaneous Interpretation

Commissioner Dennis Patrick's contemporaneous published interpretation of the rule also confirms that Trinity's interpretation was reasonable. As the Bureau would have it, Commissioner Patrick was really saying that only in the application context did the rule require merely ownership by minorities without regard to working control. But the Bureau makes no claim that Trinity was *unreasonable* in believing that Commissioner Patrick's interpretation was broader. Indeed, the Bureau plainly lacks any conviction in the spin it gingerly tries to place on the Patrick statement. "One *can infer*," hazards the Bureau, that Commissioner Patrick was saying, not that the rule exempted the minority owners from having to be in *de facto* control, but simply that applicants should have to make a pre-grant *showing* that their operation would *comply* with the minority *de facto* control requirement. MMB Opposition at 16 (emphasis added).

With all due respect to the Bureau, this floundering and halfhearted claim is insupportable.

---

[8] Having admitted that the minority ownership exception adopted the identical standard as the minority lottery preference, Glendale promptly ignores that standard. Repeating its mantra that the minority lottery preference sought to achieve "meaningful," "substantial," and "real" participation by minorities (Glendale Opposition at 40, 41, 42, 44, 45, 49, 50, 55), Glendale fallaciously equates those words with "*de facto* control." However, the eligibility standard for the minority lottery preference was "more than 50% minority ownership," a standard based entirely on beneficial ownership *without de facto control*. (In fact, passive limited partners and trust beneficiaries were explicitly held eligible for the preference.) Thus, in arguing that the Congressional lottery statute intended participation by minorities to be "meaningful," "substantial," and "real," Glendale ignores the fact that Congress *also* believed that more than 50% beneficial ownership *was* "meaningful," "substantial," and "real" *without de facto control*. Since the standard of more than 50% ownership by minorities was "meaningful" participation for purposes of the minority lottery preference, and since (as Glendale concedes) the minority ownership exception adopted the same standard, Colby May was entirely reasonable in reaching the conclusion he reached. And even if May's eminently reasonable interpretation were erroneous, such error is not disqualifying. Fox Television Stations, Inc., supra; Roy M. Speer, 3 CR 363 (1996).

What Commissioner Patrick said, in plain English, is this:

> "Under the majority's scheme, the *right* to purchase broadcast stations over the established ceiling *turns upon* the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. *No concern is given* as to *whether* the 51% minority owners *will exert* any influence on the station's programming *or will have* any control at all."[9]

These words manifestly describe the substance of the rule itself, not some application processing deficiency. The rule, said Commissioner Patrick, conferred a "right" that "turns on" race alone without regard to whether the minority owners "will" control. A legal right is not an application guideline; it is the essence of substantive law. And where a legal right is said to "turn on" a specified criterion, the specified criterion is not a mere application guideline, it is the governing legal standard imposed by law. That is clearly what Commissioner Patrick said and what he meant. The Bureau's stab at suggesting otherwise deserves no credit.[10]

Moreover, even if the Bureau were right that one "can infer" that Patrick meant something different, the Bureau itself in no way suggests that such an "inference" is compelled or that Trinity's reading of Patrick's plain words is unreasonable. (Any such contention would be ludicrous on its face.) Thus, there is no dispute that Trinity could justifiably believe that Commissioner Patrick read the rule the same way Trinity did. If that interpretation of the rule was reasonable for Commissioner

---

[9] Amendment of Section 73.3555, 100 FCC 2d, 74, 104 (1985) (Separate Statement of Commissioner Dennis R. Patrick Dissenting in Part) (emphasis added).

[10] Equally absurd is SALAD's earlier effort to dismiss Patrick's statement with the claim that he "was obviously speaking in terms of the prospective enforceability rather than the requirements articulated in the rule." *See* SALAD Reply to Exceptions filed February 28, 1996, p. 3. Patrick's concern was not that the rule was unenforceable, but that it imposed no *de facto* control requirement to *be* enforced because eligibility turned solely on "the race of the proposed owners." So clear is Commissioner Patrick's meaning that even Glendale (while calling it Trinity's "gloss") does not dispute Trinity's assertion that Patrick understood the rule to require only that minorities have majority ownership, not *de facto* control. Glendale Opposition at 29-33.

Patrick, it was likewise reasonable for Trinity.[11]

3. The Contemporaneous Report and Order

The Bureau tries to impart new meaning to the Report and Order that adopted the minority ownership exception. But this effort, too, only serves to emphasize that Trinity's interpretation was reasonable. Indeed, the Bureau's treatment of the Report and Order essentially concedes that Trinity's interpretation was also *correct*.

The Bureau begins by quoting the Commission's announced definition of minority controlled:

> "[W]e note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies. In the context of the multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard for permitting increases to the rules adopted herein." MMB Opposition at 15, *quoting* Amendment of Section 73.3555, 100 FCC 2d at 95.

This definition, the Bureau says --

> "was to guide applicants and the Commission staff as to what circumstances would justify a grant; namely, that minorities would have de jure control of the proposed

---

[11] Glendale wrongly argues that the discussion at the Commission's December 1984 meeting may not be relied upon as evidence of how Commissioners interpreted the rule they were adopting. The Court of Appeals has relied on such discussion to interpret agency orders. *See,* Pan American World Airways v. CAB, 684 F. 2d 31, 36 and n. 12 (D.C. Cir. 1982) (using transcript of CAB closed meeting to review final order that did not include a contemporaneous explanation of agency's decision); Electronic Industries Assn. Consumer Electronics Group v. FCC, 636 F. 2d 689, 693 n. 8 (D.C. Cir. 1980) (quoting open meeting commentary to amplify Commission intent). The only evidentiary limitation on the use of open meeting commentary that appears in the reported cases is narrow in scope: commentary may not be used to *challenge or impeach* the written decision. The decision cited by Glendale, Musical Heights, Inc., 41 RR 2d 743 (1977), stands for nothing more. *See also,* Kansas State Network, Inc. v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983) ("Where an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at Sunshine Act meetings should not routinely be used *to impeach that written opinion*") (emphasis added). Of course, it is small wonder that Glendale would like to ignore the statement of the Chairman who was directly responsible for the Commission's adopting the rule (Trinity Motion, Tab 3, pp. 7-8, 12), and who, after hearing Commissioner Patrick state his position, found it "exactly right."

licensee." Id.

Explaining the Commission's reasoning, the Bureau continues --

> "The definition focused only on *de jure* control because it was anticipated that a grant to an applicant under the *de jure* control of minorities would, sooner or later, result in operations that reflected the views of the minorities who owned the stations." Id.

Up to that point in its analysis, the Bureau in its own words has stated Trinity's position precisely: the definition of "minority control" as "a greater than 50% minority ownership interest" established a "meaningful standard" for the multiple ownership exception; that standard guided applicants as to the "circumstances" that "would justify a grant;" and the circumstances "for a grant to an applicant" existed when minorities "would have *de jure* control of the proposed licensee." That is exactly what Colby May advised Trinity. But then abruptly the Bureau concludes its analysis with a complete *non sequitur*:

> "Thus, there was no need for the Commission to require more *in the application* to acquire a minority controlled station." Id. at 15 (emphasis in original).

As if by magic, the Bureau pulls this conclusion out of thin air. The Report and Order gives not the slightest clue that the Commission was talking about an *application* requirement that differed from the substantive legal standard prescribed by the rule. A meaningful eligibility "standard" describes the standard for eligibility for the 14-station limit. The circumstances for the "grant to an applicant" describe the circumstances for a grant. A "standard" for a "grant" to an applicant "under the *de jure* control of minorities" describes *that* as the substantive legal standard imposed by the rule. To suggest that the Report and Order merely describes an "application" guideline is nonsense. Nothing in the Report and Order speaks of applications. Nothing in the Report and Order suggests that a standard beyond *de jure* control, *i.e.* a standard of *de facto* control, somehow applies outside the scope of the

only standard the Report and Order describes. Not surprisingly, the Bureau offers no citation to support its untenable claim.

The flawed logic of the Bureau's *non sequitur* is no basis on which to strip Trinity's licenses. Indeed, if the concluding *non sequitur* in the Bureau's analysis is disregarded, the Bureau interprets the Report and Order exactly as Colby May did. By the Bureau's own words, May was correct. At the very least, even if the English language is now construed to mean something other than what it plainly says, May's interpretation was *reasonable*. Moreover, if the *de jure* ownership standard stated in the Report and Order is retrospectively declared a mere application processing guideline, Trinity had no clear notice -- indeed no notice whatever -- of that subtlety at the time.

4. The Commission's Contemporaneous Interpretation

While pulling legal conclusions out of thin air, the Bureau at the same time refuses to confront clear Commission authority that refutes its position. As Trinity has demonstrated, only months after adopting the minority ownership exception, the Commission said precisely what the term "minority-controlled" in that rule meant:

> "For purposes of these provisions, 'minority controlled' broadcast stations are defined as those in which *more than 50 percent of the equity interest is owned* in the aggregate by persons who are members of a minority group."
>
> * * *
>
> "Under the 'minority incentive policy, in contrast, *ownership interests* of minority group owners are aggregated in computing control and, consequently, there is no requirement that any one person possess an *equity* interest in the business that exceeds 50 percent."[12]

That language could not be more direct. Minority control exists when more than 50% of the "equity" is "owned" by minorities. That is what the Commission's words say. That is what the

---

[12] Minority Incentive Reexamination, FCC 85-303, released July 1, 1985, 50 Fed Reg. 27629, Trinity Motion, p.10, Tab 4, pp. 3, 4 (emphasis added).

Commission's words mean. That is the beneficial ownership standard of the lottery legislation. That is how Colby May interpreted the rule, and how he advised Trinity. Unless the Commission's words again do not mean what they plainly say, May's interpretation was right. Under no circumstances was his interpretation unreasonable, and the Bureau does not so suggest. It simply ignores altogether the Commission's own contemporaneous language, which establishes that by all logic May's interpretation was correct, and was surely reasonable.[13]

5. The Meaning of Cognizable Interests

The Bureau fails to confront the fact that the rule imposes no restriction on the sort of interest that non-minorities may hold in a thirteenth or fourteenth station. But even if the non-minorities were limited to having a "cognizable interest," that would not preclude their exercising actual working control over the station, because, as Trinity has shown, a cognizable interest allows control.

The Bureau's effort to dispute that point is untenable. The Bureau does not deny that in the same year it launched the multiple ownership proceeding, the Commission explicitly affirmed that it will *presume* that a cognizable interest "is controlling." FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983), Trinity Motion at Tab 12, p. 7; Attribution of Ownership

---

[13] Glendale and SALAD also ignore completely the Commission's contemporaneous language interpreting the minority ownership exception. Since the language is unanswerable as to the correctness and certainly the reasonableness of May's interpretation, it is understandable why these private party advocates would want to pretend it was never said. It is a mystery, however, why the Bureau, whose responsibility is to advocate impartially, would ignore plain Commission language that is directly on point, and instead cite non-pertinent language that merely restates the issue. In this regard, while the language quoted by the Bureau describes the requirement that "minority-controlled stations [be] involved" (MMB Opposition at 17), it does not purport to define what "minority-controlled" means. The answer to that question lies in the language that Trinity has cited, which the Bureau has inexplicably chosen to ignore.

Interests, 97 FCC 2d 997, 1010-11 (1984).[14] Although correctly recognizing that a cognizable interest is presumed controlling, the Bureau goes badly astray in its analysis. According to the Bureau, a cognizable interest may be controlling only in certain contexts, and "in the context of the minority controlled exception to the multiple ownership rules, a cognizable interest held by a non-minority could not be controlling." MMB Opposition at 17. But that contention is totally unsupported. The Bureau points to no ruling where the Commission has ever said that only in *certain* contexts are cognizable interests presumed controlling, or has ever specified in *which* contexts the presumption applies, or has ever held that the presumption does *not* apply in the context of the minority ownership exception. In fact, the Commission has held the *opposite*. In Minority Incentive Reexamination, *supra*, the Commission discussed its policy that the attribution standards "are designed to measure what ownership interests will confer that amount of *influence or control* which must be limited," and it asserted:

> "The determination that a certain stock interest or other position might confer such influence or control is equally valid *regardless of the particular context of rule in which it is applied.*" Trinity Motion at Tab 4, pp. 5-6 (emphasis added).

So much for the Bureau's claim to the contrary.

Once again, unless the Commission's words do not mean what they plainly say, Trinity's interpretation was manifestly correct and indisputably reasonable. Since a cognizable interest is presumed to be controlling, and since a cognizable interest has the same meaning "regardless of the particular context of rule in which it is applied," it was certainly reasonable for Colby May to

---

[14] Cognizable interests thus are one of several bases on which the rule completely supports May's interpretation. Others are addressed herein and in the Comments of Colby May (at 9-12).

conclude that the interest permitted under the minority ownership exception could confer control.[15] Further, the Bureau is utterly arbitrary in contriving a distinction between the minority ownership exception and "most other contexts" of the multiple ownership rule. According to the Bureau, a cognizable interest under the minority ownership exception may be "influential," may "provide guidance," may "in most other contexts" be "controlling," and may be "so influential as to warrant inclusion in a determination of the total number of cognizable interests held." Yet the Bureau does not suggest where one would find notice of what conduct is permitted in which contexts. Enforcement without such notice would be fundamentally arbitrary and would violate due process.

6. NMTV's Bylaws

In determining reasonableness, the Commission also must consider the Bureau's review of NMTV's bylaws when it granted the Odessa application in 1987 -- another crucial point not addressed by the Bureau in its pleading. The Bureau does not dispute that, when it processed NMTV's Odessa application, it specifically asked to see NMTV's bylaws and Colby May promptly furnished the document. The bylaws could not have been more explicit in stating that Trinity's Paul Crouch, as president of NMTV, "*shall*, subject to the control of the Board of Directors, generally *supervise, direct, and control the business and the officers* of the corporation" (emphasis added). There was no way to construe that provision as anything other than corporate authorization for Crouch to exercise *de facto* control over NMTV. And with that provision in front of it at its own request, the Bureau granted the application.

---

[15] The Bureau does not dispute that The Washington Post Company and its counsel, Covington & Burling, similarly maintained that the exception permitted non-minorities to "actually control" the stations involved. MMB Opposition at 17. That being an honest and reasonable interpretation on their part, so it was for Colby May and Trinity.

Under those circumstances, Trinity was especially justified in believing that its interpretation of the rule was correct. The Bureau's action fully confirmed that interpretation. Presented with by-laws that authorized Paul Crouch to have working control of the operation of NMTV subject to *de jure* control by the minority Directors, the Bureau responded by approving NMTV's application. Based on that, how could Trinity have reasonably perceived that its understanding of the minority ownership exception was *wrong*? Indeed, with the Bureau *approving* bylaws that expressly authorized Crouch to *hold de facto* control, how could Trinity have possibly perceived that the Commission would later charge Crouch with *unauthorized* exercise of *de facto* control? Whether or not in retrospect the Bureau itself was wrong, Trinity was entirely reasonable in concluding that the relationship between Trinity and NMTV complied with the rules once the Bureau acted. The Bureau in its pleading does not contend otherwise.

7. The Bureau's Contemporaneous Understanding

To declare Trinity's interpretation of the rule unreasonable would also be irreconcilable with the now uncontroverted affidavit of Alan Glasser, which establishes that in 1987 the Bureau itself understood the minority ownership exception exactly as Trinity did. The following facts are undisputed: (a) May informed Glasser that Trinity would provide NMTV with financing and programming and that NMTV Director Jane Duff was a Trinity employee; (b) Glasser was "very concerned" about the relationships between Trinity and NMTV principals; (c) Glasser expressed his concerns to his Division Chief to ask if more information was needed; (d) Glasser was told that it "would be sufficient" to obtain NMTV's bylaws and determine their compliance with the state requirements where executed; (e) the Bureau requested the bylaws and Colby May provided them; and (f) the bylaws told the Bureau that the President of NMTV [Paul Crouch], whom the application

also identified as the President of Trinity, had authority to exercise *de facto* control over NMTV.

In short, the Bureau knew that Trinity and NMTV had a close relationship, knew that its own supervising attorney had expressed concerns about that relationship, and saw the bylaws that authorized Trinity's President Paul Crouch to exercise *de facto* control over NMTV. Given those facts, it is hardly conceivable that the Bureau would have granted the application if it had considered *de facto* control to be relevant. As the Commission rulings described above clearly show, of course, *de facto* control was *not* germane under the minority ownership exception. And the Bureau plainly understood as much at the time, no matter what may be its recollection today. If Glasser's statement had not been accurate, the Bureau was uniquely positioned to point that out in its pleading. But it has not disputed Glasser in any way, nor has it challenged the clear import of what he says. Thus, while the Bureau may argue today (after the HDO) that Trinity's view of the law was wrong, the undisputed fact is that the Bureau *shared* that same view in 1987.

Because the Bureau shared the same understanding of the minority ownership exception as Trinity did in 1987, the Commission cannot now hold that Trinity's interpretation was unreasonable without *ipso facto* holding that its own Mass Media Bureau was unreasonable -- not just wrong in its view of the law, but *unreasonably* wrong. For the Commission to so hold would be legally indefensible, since an interpretation of a new Commission rule made in good faith by the arm of the agency charged with administering the rule is reasonable almost by definition. So the Commission cannot hold that Trinity's understanding of the law was unreasonable, and it certainly could not do so without explaining why Trinity should be subjected to a double standard that made what was reasonable for the Bureau *un*reasonable for Trinity.

8. Note 1

The Bureau is likewise wrong in asserting that Trinity's position is undercut by what the Bureau calls the "obvious meaning" of Note 1: that the concept of control in the multiple ownership rules included both *de facto* and *de jure* control. MMB Opposition at 20. Note 1 does, to be sure, adddress the concepts of *de facto* and *de jure* control. But the Bureau mistakenly assumes that the Commission meant to import both concepts into the special definition of "minority-controlled." That clearly is not what the Commission did or intended, for the special definition of "minority-controlled" adopted as §73.3555(d)(3)(iii) becomes gibberish if the word "controlled" in that definition imports the Note 1 meaning of "control." Section 73.3555(d)(3)(iii) actually reads in pertinent part:

"MINORITY-CONTROLLED MEANS MORE THAN 50% OWNED"

Assigning the Note 1 meaning to the word "controlled" in that definition would convert §73.3555(d)(3)(iii) to read:

"MINORITY- MORE THAN 50% OWNED OR ACTUALLY CONTROLLED MEANS MORE THAN 50% OWNED"

This is precisely like changing "*green* means green" to "*green or red* means green." Since that makes no sense, and since the Commission cannot have intended to make no sense, it is reasonable to conclude that the Commission did not intend to inject the "working control" element of Note 1 into the special definition of "minority-controlled." The special definition is separate from Note 1, and the Commission meant them to be separate when it specifically defined "minority-controlled" in words that excluded the concept of working control.[16]

---

[16] The fundamental difference between Note 1 and the special definition of "minority-controlled" reflects their opposite purposes. The purpose of Note 1 was to define an attribution factor (actual working control) that would *count against* the attributee's 12-station limit. The (continued...)

D. Conclusion

Trinity cannot be disqualified if any *one* of the following are true: (a) Trinity's interpretation of the minority ownership policies was correct; (b) Trinity's interpretation was reasonable; or (c) clear advance notice of the Commission's requirements was not given. Since *all three* are true, Trinity's motion should be granted.

Respectfully submitted,

TRINITY BROADCASTING OF FLORIDA, INC.

TRINITY BROADCASTING NETWORK

By: Howard A. Topel

Nathaniel F. Emmons
Howard A. Topel

Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue, N.W. -- Suite 300
Washington, D.C. 20036-2604
(202) 659-4700

December 5, 1996

---

[16](...continued)
purpose of the special definition was to define circumstances under which the normal attribution factors would *not count against* the 12-station limit. Reflecting these opposite purposes, Note 1 and the special definition are focused on different points. To determine attribution liability, Note 1 looks to the interest (actual working control) held in the entity by the *attributee* (the group owner). In contrast, to determine eligibility for the minority exception, the special definition looks to the interests held in the entity by persons *other than* the attributee (the minority owners). There is no indication that the Commission meant to mix the two concepts in a way that turned an attribution *liability* against the group owner under Note 1 into an *eligibility requirement* for the minority owners under the special definition. Had the Commission intended to do that, it could easily have done so directly by framing the special definition to read: "*MINORITY-CONTROLLED* MEANS MORE THAN 50 PERCENT OWNED BY, AND UNDER THE ACTUAL WORKING CONTROL OF, ONE OR MORE MEMBERS OF A MINORITY GROUP." The Bureau concedes that the Commission "fail[ed] to do so." MMB Opposition at 16-17.

ATTACHMENT A

David E. Honig
Attorney at Law
3636 - 16th Street N.W.
Suite B-366
Washington, D.C. 20010

Telephone (202) 332-7005
Telecopier (202) 332-7511

Licensed in D.C. only

October 15, 1996

Dear Howard,

[NON-GERMANE MATERIAL REDACTED]

By the way, while I don't agree with your Motion to Vacate, I welcome it as an outstanding bit of advocacy which does focus the Commission's attention on a critical issue.

Kind regards,

David Honig

Enclosures

/dh